

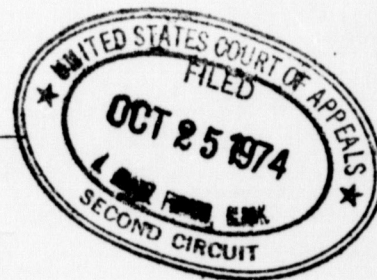
***United States Court of Appeals
for the Second Circuit***



REPLY BRIEF

74-1680

UNITED STATES COURT OF APPEALS
For The
SECOND CIRCUIT



SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee

v.

MANAGEMENT DYNAMICS, INC., WILLIAM N. LEVY,
EDWIN BARRETT, CLYDE GOFF, EPHRAIM HOFFMAN,
PETER R. WATSON, GLOBAL SECURITIES, INC.,
ALLEN LANGENAUER, DAVID LANGENAUER, BERNARD
OSCHERS, LEE SCHNEIDER, A.J. CARNO, INC.,
ANTHONY NADINO, MAYFLOWER SECURITIES, INC.,
JOSEPH CIRELLO, FAIRFIELD SECURITIES, INC.,
THOMAS F. BRENNAN III, SAMUEL D. HODGE,

Defendants,

WILLIAM N. LEVY, A.J. CARNO, INC.,
MAYFLOWER SECURITIES, INC., ANTHONY NADINO,
SAMUEL D. HODGE,

Defendant-Appellants.

DEFENDANT-APPELLANT WILLIAM N. LEVY REPLY BRIEF

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REPLY BRIEF

Restatement of Facts and Issues

In its brief the SEC has restated the issues that it believes are presented for the Court's determination. Its argument centers around its contention that the District Court did not abuse its discretion in issuing a preliminary injunction against Appellant Levy. Levy submits that this is not responsive to the issues that are actually presented, to wit that the Court below committed reversible error in that its findings of fact and conclusions of law are clearly erroneous, and that the Commission failed to adequately show the need for a preliminary injunction.

The granting of a request for a preliminary injunction necessarily entails three levels of judicial process. There must first be a clear finding of fact that a violation of the law has indeed occurred. Second, there must be a clear showing that a preliminary injunction is necessary to preserve the status quo and to afford necessary protection. Third, the equities of the case must weigh in favor of its issuance. Only on this third level does judicial discretion come into play as the trial Court balances the equities of the case. On the first and second levels the burden must

rest with the party seeking the injunction to demonstrate both the violation of law and the overriding necessity for injunctive relief.

It is Levy's contention that the Court's findings that the Commission had satisfied its burden on these two levels are clearly erroneous as contrary to the evidence presented and must be reversed as a matter of law.

In raising these issues for review, Appellant Levy fully expected that the Commission, in its brief, would, of necessity, defend the findings of the Trial Court and adopt them as its own. The Commission has chosen not to do so and its brief is replete with new theories by which it seeks to justify the Court's ultimate decision. Apparently, even the Commission has realized that the findings of the Trial Court are clearly not supported by the record and are hence indefensible.

In addition, it should be noted that no response was made by the Commission to the issue raised in Point IV of Appellant Levy's brief that the Court had relied on inadmissible hearsay in reaching its decision. While this issue is necessarily intertwined with other issues presented in this

appeal (see Point II, infra). Appellant Levy nonetheless reiterates his position that this, in and of itself, constitutes prejudicial and reversible error and should not be minimized by the Commission's failure to respond to it.

As regards the statement of facts offered by the Commission, Appellant Levy respectfully submits that, presumably in the name of advocacy, the Commission has included a number of statements which are not factual but are rather its own conclusions and impressions of the case and are not born out by the record. Thus, Levy takes issue with the Commission's statements of "fact" that the August 15 letter created a materially misleading impression. (Appellee's Brief 9); that Levy caused the Company to issue 960 000 unregistered shares (Appellee's Brief 12); that the unknown individual from California (Buzz) was offering 100 000 MD shares for sale (Appellee's Brief 13) and that Peter Watson in fact offered the shares to others (Appellee's Brief 14). These, among others, are the key facts in issue in this case and cannot be taken as established.

Point I

IN RESPONSE TO POINT I-A OF APPELLEE'S
BRIEF, APPELLANT LEVY DID NOT VIOLATE THE
ANTI-FRAUD PROVISIONS OF THE FEDERAL
SECURITIES LAWS.

The issue here is two-fold, first whether the documents in question were materially false and misleading so as to be violative of the federal securities laws and second, whether Appellant Levy committed the alleged violation so as to warrant the issuance of a preliminary injunction against him.

As more fully set forth in Point II of Appellant Levy's brief, a violation of the anti-fraud provisions of the Securities Laws must be predicated upon a showing that the allegedly false or omitted information must be material in nature. There has been no allegation in this action that any of the defendants made any affirmatively false statements or that the documents contained any. Rather, the basis of the Commission's complaint was that the documents omitted certain information which created a false impression in the mind of the investing public.¹

(1) Of the myriad of allegations contained in the Commission's complaint and moving papers, the Court below found that the documents were deficient only in that they omitted material information about the options and Barrett's indispensability to MD. It is these findings with which Levy takes issue.

In his brief, Appellant Levy sets forth the proposition that materiality is a concept which is difficult to define in the abstract but rather must be viewed within the context of all of the facts presented. Further, Levy urged that the appropriate standard to be applied to the consideration of the materiality of a particular bit of information was that of a reasonable man. SEC v. Texas Gulf Sulphur, 401 F. 2d 833 (1968); List v. Fashion Park Inc. 340 F. 2d 457.

To this the Commission has replied that "the letters and press release conveyed the impression that the Company had a bright future in real estate development by exuding optimism about the Company's growth potential." (Appellee's Brief 17). The Commission seeks to support this position by excerpting various statements from the documents, particularly relating to the assets to be acquired from Barrett and the proposed business of the Company, and arguing that through these statements the documents "conveyed the impression that the acquisition would lead the Company into the promised land of high earnings." (Appellee's Brief 18). It should be stressed that this is solely the Commission's interpretation of the documents and is put forth presumably because this is the type of impression that the documents would have had to

give for there to have been a violation of the law. There is no evidence whatsoever that even one member of the investing public adopted this position as his own. Appellant Levy believes that the contention that a reasonable man could have formed such a belief from the documents in question is palpably absurd and that no violation of the law can be based upon them.

Moreover, these assertions were certainly not adopted by the Court below and thus have no relevance to this appeal. The issue raised herein is that certain of the findings of the Court are clearly erroneous in light of the evidence presented. Specifically, Appellant Levy takes issue with the findings that "No mention was made of the conditions to which effective exercise of the option was subject" that "the indeterminate nature of the option was not disclosed", and that "the October release failed to indicate that the required approval by local and state officials might not be given." (Cts. opinion at 5 App. 122). It was upon these findings that the Court based its conclusion that a violation of the law had occurred and in turn, that injunctive relief was warranted. Although this was fully set forth in Appellant Levy's brief (40-41), the Commission has not seen fit to reply to it. Levy re-asserts that these findings are not

born out by the evidence and that a simple reading of the documents will disclose mention of the conditional nature of the options and the requirements of local and state approval where the Court found none. These findings were clearly erroneous, require reversal, and should be dispositive of this Appeal:

In reply to the Appellee's argument that more information about the conditional nature of the options should have been disclosed. Appellant Levy submits that the specific information which the Commission argues was omitted from the documents was and is immaterial as a reasonable man would not have been influenced one way or the other by its inclusion in light of the fact that the documents make it clear that the Company might not have been able to exercise the options. The Commission's argument is one of degree, while the Court's finding deals with an absolute, which Appellant Levy asserts, is absolutely and clearly erroneous.

POINT II

IN RESPONSE TO POINT I-C OF APPELLEE'S BRIEF,
APPELLANT LEVY DID NOT VIOLATE THE REGISTRA-
TION PROVISIONS OF THE SECURITIES ACT.

In Points I and III of his brief, Appellant Levy raised the issues that the Court's findings (1) that Levy somehow coerced the Board of Directors into issuing the original 560,000 shares of MD stock to Peter Watson without restrictive legend by assuring them that this was the proper procedure and (2) that Levy himself had authorized the issuance of the additional 400,000 shares to Watson. were contrary to the evidence and clearly erroneous. The Commission has not replied to either of these issues and indeed, has now taken the position that Levy was but a member of MD's Board of Directors and only delivered the Certificates to Watson (Appellee's Brief 40), without alleging that Levy somehow coerced or authorized anything. It would thus seem that they conceded the point.

Further. the Commission's brief is devoid of any reference to the issue raised by Levy that the Court committed prejudicial and reversible error in ruling as it did at the hearing that the transfer of the shares to Watson was for the

purpose of a private placement (transcript 268-269, App.302-303 Levy Brief 44-45) and holding to the contrary in its opinion. Rather, the Commission argues that the burden of establishing an exemption from the registration requirements rests upon the person claiming the exemption without replying to Appellant Levy's assertion that this burden was necessarily satisfied by the Court's ruling at the hearing.

The thrust of the Commission's argument on this point seems to be that the registration provisions were violated because the Watson shares were sold or at least offered for sale. As pointed out in Appellant Levy's brief, the record is totally devoid of any proof of this fact. Moreover the Court based its finding that an offer had indeed occurred upon the testimony that Carno had received an interstate telephone call from a person identified only as Buzz, who never, in fact, even offered to sell any MD shares. The Commission also relies upon this conversation to prove its assertion that an offer had been made without any reference to the fact that the conversation was inadmissible hearsay nor any response to Point IV of Appellant Levy's brief which clearly raised this question. Levy re-asserts his position that the Court's reliance upon this conversation in reaching

its decision was clear and prejudicial error.

POINT III
THE DISTRICT COURT ERRED IN GRANTING A
PRELIMINARY INJUNCTION AGAINST APPELLANT
LEVY.

In its brief, the Commission urges that the Court below did not abuse its discretion in enjoining Mr. Levy. The Commission argues that such relief is proper where there is a reasonable expectation of future violations which in turn may be inferred from past violations. Appellant Levy's position, which has been essentially ignored by the Commission, is that the past violations, that is the violations alleged in this action, have not been established and that the Court's conclusion to the contrary is based upon findings of fact which are clearly erroneous and require reversal.

The Commission sought an injunction against Levy on two basic theories in which the Court concurred. first, that Levy was a knowing participant, indeed the "prime architect", in a complicated and multi-facited scheme to defraud the public and second, that he was an experienced securities lawyer whose position as such made regulation of his conduct a necessity.

As noted in Point I of Appellant Levy's brief, the Commission was utterly unable to establish that Levy was at

the center of the three-fold scheme as they alleged. In response to Levy's assertion that he, of necessity, relied upon Barrett's expertise in the field of real estate development in preparing the August 15 letter, the Commission argues that Levy failed to use "due diligence" in ascertaining the accuracy of the information supplied to him by Barrett. (Appellee's Brief 25). This, of course, is a far cry from the Commission's earlier position, upon which it sought the injunction, that Levy had deliberately created a false impression.

Further, in response to Levy's assertion that he had not, as the Court found, authorized the issuance of the 960,000 shares to Peter Watson and that he was only acting for the Board in delivering those shares, the Commission admits that Levy was but one member of the Board which authorized the issuance of the shares and only delivered them to Watson (Appellee's Brief 40).

Finally, in response to Levy's assertion that he had no connection whatsoever with the broker-dealers, the Commission, by way of a footnote offers to prove the connection
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at trial (Appellee's Brief 39). This is tantamount to an
(2) To set the record straight, the testimony is clear that Levy met only once (not four or five times) with Berkson and not at all with the other broker-dealers.

admission that they totally failed to prove this connection at the hearing.

Levy does not deny that he is an experienced securities lawyer nor is he attempting to hide behind that fact by asserting that he was merely the servicer or errand boy for the corporation. He does however, strongly assert that he did not use his position and experience to the disadvantage of his client, to defraud the public or to his own personal advantage. There is absolutely no proof that Levy acted in any but a forthright and straightforward manner throughout. In its effort to protect the public from Mr. Levy, the Commission has forgotten that it was Levy who first brought this entire matter to the Commission's attention.

CONCLUSION

For all of the foregoing reasons the Court's order of a preliminary injunction against Appellant William N. Levy should be reviewed, and the injunction vacated.

Respectfully submitted.

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